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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 853

THE UNITED STATES OF AMERICA, PETITIONER

VS.

THE A. S. KREIDER COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 15, 1941

CERTIORARI GRANTED APRIL 14, 1941

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. —

THE UNITED STATES OF AMERICA, PETITIONER

VS.

THE A. S. KREIDER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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In United States District Court for the Middle District of
Pennsylvania

No. 2927—January Term, 1932

THE A. S. KREIDER COMPANY

vs.

UNITED STATES OF AMERICA

Docket entries

1932

- Mar. 7—Statement of Plaintiff's demand for judgment for \$13,471.18, with interest at the rate of six per cent per annum on \$13,120.47 from November 13, 1921, and on \$350.71 from September 14, 1921, together with costs of suit and such further relief as this Court shall deem just.
- Mar. 14—Affidavit of proof of service of petition.
- Mar. 22—Praecipe for appearance of Andrew B. Dunsmore & Joseph B. Jenkins, attorneys for defendant.
- May 7—Order extending time for filing answer to July 1, 1932.
- May 25—Petition to strike off plaintiff's statement and
- May 25—Order granting rule returnable to Argument Court (W).
- June 6—Answer to rule.
- Oct. 25—Order discharging the rule granted May 25, 1932, and directing that affidavit of defense be filed within fifteen days.
- Nov. 5—Affidavit of defense.
- Nov. 5—Certified copy of affidavit of defense handed U. S. Attorney.
- Nov. 18—Plaintiff's reply.

1935

- Jan. 8—Praecipe to place case on the trial list for the Mar. term 1935.
- Apr. 25—Praecipe and Order directing case be placed specially on May term trial list, 1935 (W).
- May 16—Order placing case on trial list for June term, 1935 (J). (For order see Case 2926.)
- Nov. 13—Praecipe to place case on trial list for Dec. term, 1935.
- Dec. 18—Witness called, sworn and examined (See List) (For list see Case 2926).
- Dec. 18—Defendant's request for a directed verdict.
- Dec. 23—Transcript of evidence and
- Dec. 23—Order of approval and directing it to be filed (W).

1936

- Feb. 3—Petition to withdraw transcript and
- Feb. 6—Order authorizing Clerk to mail transcript with exhibits attached to Hause, Evans, Storey & Lick, Esqs.
- Feb. 6—To be returned in 10 days (W) (Mailed) Rec'd 5/11/36.
- May 9—Plaintiff's proposed findings of fact & conclusions of law.

1936

Aug. 14—Defendant's motion for judgment. Defendant's request for special findings of fact and conclusions of law.

Aug. 14—Brief for the United States.

Aug. 26—Opinion and Order that defendant's motion for judgment is granted, and judgment is directed to be entered in favor of the defendant and against the plaintiff (W). Judgment entered in favor of the defendant, United States of America and against the plaintiff, the A. S. Kreider Co.

Aug. 26—J. S. 6.

Oct. 15—Notice of plaintiff's appeal and proof of service thereon.

Nov. 24—Petition of plaintiff for an appeal and Order allowing an appeal. Bond in sum of \$250.00 required (W). Assignments of error. Praeipe for record on appeal and Order authorizing and directing the Clerk of the District Court to mail all original files set forth in the praecipe to the Clerk of the U. S. Circuit Court of Appeals 3rd Circuit (W).

Dec. 2—Bond on appeal and

Dec. 2—Order of approval (W).

Dec. 2—Citation issued (W).

Dec. 3—Copies mailed Donald Horne, Esq.

Dec. 10—Affidavit of service of praecipe and other papers.

Dec. 10—Amended assignment of errors.

Dec. 10—Supplemental praecipe and

Dec. 11—Order that Clerk include in transcript on appeal documents set forth in supplemental praecipe (W). All files returned 3/4/38.

Dec. 11—Copy of citation and affidavit of service thereon.

Dec. 23—Affidavit of service of orders of Court etc. by mailing.

1938

July 28—Mandate from U. S. Circuit Court of Appeals, reversing the judgment of the District Court, cause remanded to the District Court with directions to consider and determine the merits of the controversy.

1939

Dec. 19—Opinion and Order, Judgment is directed to be entered in favor of the plaintiff, and against the defendant, in the sum of \$13,471.18, with interest at the rate of six percent on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921 (W). Judgment entered in favor of the plaintiff, A. S. Kreider Company and against the defendant, United States of America, in the sum of \$13,471.18 with interest at the rate of six per cent on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921. Notice of entry of judgment mailed Frederick V. Hollmer, United States Attorney.

Dec. 19—J. S. 5 & 6.

1940

- Jan. 12—Statement of Marshal's fees & expenses (None).
Mar. 8—Notice of appeal of United States to judgment entered Dec. 19, 1939.
Mar. 8—Copy of notice of appeal mailed Clerk U. S. Circuit Court of Appeals, Phila., Pa. and House, Evans & Baker, Esqs., Harrisburg, Pa.
Apr. 5—Appellant's statement of points.
Apr. 5—Stipulation and agreement of counsel for record on appeal and Order authorizing and directing the Clerk of the District Court to mail all original files to Clerk U. S. Circuit Court of Appeals (W).
Apr. 5—Stipulation and agreement of counsel omitting certain records from record on appeal.
Apr. 8—All files stipulated handed Jos. P. Brennan, Esq., Asst. U. S. Attorney.
Apr. 9—Order extending the time for filing record on appeal and docketing action to June 3, 1940 (W).
Apr. 9—Certified copy of order mailed House, Evans & Baker, Esq., and Clerk U. S. Circuit Court of Appeals, Phila. Pa.
Apr. 16—Government's exhibits Nos. 1 and 2.
Apr. 16—Opinion of U. S. Circuit Court of Appeals, 3rd Circuit, filed May 23, 1938.

4 In United States District Court

[Title omitted.]

Statement of plaintiff's demand

Filed March 7, 1932

The A. S. Kreider Company, plaintiff above named, brings this suit against the United States of America, defendant above named, to recover the sum of \$13,471.10, with interest on \$13,120.47 from December 15, 1921 and on \$350.71 from September 15, 1921, upon a cause whereof the following is a statement:

1. That plaintiff at all times herein mentioned has been and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business at Annville, Lebanon County, Pennsylvania.

2. That plaintiff duly filed its income and profits tax return for the calendar year 1920 with Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, on or about March 15, 1921, and paid the taxes shown on said return as follows: To said Ephraim Lederer, Collector, on March 14, 1921, \$13,120.50; on June 14, 1921, \$13,120.50; to Blakely D. McCaughn, Collector, successor to said Ephraim Lederer, on

September 14, 1921, \$13,120.50; and on November 13, 1921, \$13,120.47; that said Ephraim Lederer ceased to hold office as Collector of Internal Revenue on July 31, 1921, and has not held said office since that date; that said Blakely D. McCaughn, ceased to hold office as Collector of Internal Revenue on December 31, 1927, and has not held said office since that date.

3. That prior to June 15, 1926, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have the taxes due for said taxable year 1920 determined and assessed within five years after the return was filed; that said waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924; that the Commissioner of Internal Revenue accepted and executed said waiver.

4. That thereafter and on April 10, 1926, the Commissioner of Internal Revenue sent to plaintiff, by registered mail, a deficiency notice, pursuant to the provisions of section 274 of the Revenue Act of 1926, claiming additional income and profits taxes, for the calendar year 1920 in the sum of \$1,362.50, and notifying plaintiff of its right, within sixty days after said date to file an appeal with the United States Board of Tax Appeals for a redetermination of said alleged deficiency; that plaintiff did not file an appeal with the United States Board of Tax Appeals.

5. That thereafter, in July 1926, the Commissioner of Internal Revenue assessed said amount of additional tax, and on July 28, 1926, plaintiff paid the tax, making the total paid for said year \$53,844.47.

6. Thereafter, on or about March 23, 1929, within four years after the taxes for 1920 were paid, plaintiff filed with the Commissioner of Internal Revenue its claim for refund, on Treasury Department Form 843, for \$53,844.47, overpayment of income and profits taxes for said calendar year 1920, with full statement of the grounds and reasons for refund in detail, and facts and evidence in support thereof.

6 7. That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of \$14,833.68, and that the correct amount of income and profits taxes for said year was \$39,010.79, whereas plaintiff had been assessed and had paid the sum of \$53,844.47.

8. That thereafter, defendant refunded to plaintiff the sum of \$1,362.50, but withheld and kept, and still withholds and keeps from plaintiff the balance of said overpayment, in the sum of \$13,471.18, although plaintiff has demanded same.

9. This is a suit of a civil nature arising under the internal revenue laws, and authorized by section 24 of the Judicial Code as amended by section 1122, subdivision (a) of the Revenue Act of 1926.

WHEREFORE, plaintiff demands judgment for \$13,471.18, with interest at the rate of six per cent per annum, on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921, together with costs of suit and such further relief as this Court shall deem just.

(S) DOUGLASS D. STOREY,

(S) RALPH J. BAKER,

Attorneys for Plaintiff.

[Duly sworn to by D. Robert Kreider, jurat omitted in printing.]

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In United States District Court

[Title omitted.]

Affidavit of defense

Filed November 5, 1932

The United States of America, defendant, above-named, and hereinafter called "defendant", has a just, full, true and legal defense to the whole claim of plaintiff, above-named, and hereinafter called "plaintiff", which defense is of the following nature and character, to wit:

1. Admitted.

2. Admitted except that the several dates of payment were respectively as follows: March 15, 1921, June 15, 1921, September 16, 1921, and December 15, 1921, and not as set forth in the Statement of Plaintiff's Demand.

3. Admitted.

4. Admitted.

5. Admitted.

6. Defendant admits that a document designated a claim for refund was filed by plaintiff on or about March 25, 1929, but shows unto the court that the only portion of the taxes for the year 1920, which had been paid by plaintiff within four years prior to the filing of said document, was the sum of \$1,362.50, and that said sum of \$1,362.50 has been refunded to plaintiff as plaintiff admits in Paragraph 8 of its Statement of Demand; that said document or alleged claim for refund was without force or effect as to any part of the taxes paid by

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plaintiff for the year 1920 other than said sum of \$1,362.50, and does not meet the conditions precedent which plaintiff must meet in order to institute or maintain this action; that the moneys which plaintiff seeks to recover herein having been paid by plaintiff as taxes for the year 1920, more than four years prior to the filing of said alleged claim for refund, this court is without jurisdiction herein.

7. Defendant admits the averments in Paragraph 7 of Plaintiff's Statement of Demand but shows unto the court that said averments are incomplete in that at the same time and in the same document which showed an overassessment of \$14,833.68, the Commissioner of Internal Revenue determined and declared that \$13,471.18 were barred from being refunded by the statute of limitations imposed by Congress on refunds of taxes.

8. Defendant admits the averments of Paragraph 8 of Plaintiff's Statement of Demand but shows that said averments are incomplete in that the moneys which plaintiff seeks to recover in this action are barred from recovery by plaintiff or from being refunded by the defendant as hereinbefore set forth.

9. Defendant denies that this suit is authorized by any Section of the laws of the United States, and, on the contrary, shows unto the court that plaintiff is not authorized either to institute or maintain this suit and that this court is without jurisdiction to proceed in this action other than to enter a judgment for the defendant.

(Signed) ANDREW B. DUNSMORE,
United States Attorney.

[Duly sworn to by Joseph B. Jenkins, jurat omitted in printing.]

11 In United States District Court

[No. 2927 (title omitted).]

Reply

Filed November 18, 1932

The A. S. Kreider Company, plaintiff herein, answers the affirmative allegations of defendant's Affidavit of Defense, as follows, to wit:

1. Admits the averments of fact in paragraph 2 thereof.
2. Denies that the claim for refund mentioned in paragraph 6 thereof was without force or effect as to any part of the taxes paid by plaintiff for the year 1920, and avers that said claim applies to all income and profits taxes paid by plaintiff for said year 1920, and that this Court has jurisdiction herein.

3. Admits the averments of fact in paragraph 7 of the Affidavit of Defense and avers that the Commissioner of Internal Revenue, in a Certificate of Overassessment delivered to plaintiff in October, 1929, determined an overpayment of income and profits taxes for the year 1920 in the sum of \$14,833.68; that he, at said time, refunded to plaintiff the sum of \$1,362.50, and withheld, and still withholds, the sum of \$13,471.18, stating that refund of said amount was barred by the statute of limitations; that said claim for refund was filed within four years after the tax for 1920 was paid; that said claim was timely as to the entire amount claimed under the provisions of subdivision (g) of section 284 of the Revenue Act of 1926 and was not barred by any statute of limitations.

4. Answering paragraph 8 of the Affidavit of Defense, plaintiff denies that the moneys sought to be recovered in this action are barred from recovery by plaintiff or from being refunded by defendant.

5. Answering paragraph 9 of the Affidavit of Defense, plaintiff denies that plaintiff is not authorized to institute or maintain this action, and denies that this Court is without jurisdiction to proceed herein, and avers that this Court has jurisdiction of this suit and to enter judgment for plaintiff for the amount of its claim with interest and costs.

[Duly sworn to by D. Robert Kreider jurat omitted in printing.]

[S] DOUGLASS D. STOREY,

[S] DONALD HORNE,

Attorneys for Plaintiff.

14 In United States District Court

[Title omitted.]

Statement of evidence

Filed December 23, 1935

Now, Wednesday, December 19, 1935, at twelve-fifteen o'clock p. m., the above matter came on for hearing before Honorable A. L. WATSON, United States District Judge, without a jury, in Court Room No. 1, Federal Building, Scranton, Pennsylvania.

Appearances

For the Plaintiff: Donald Horne, Esq., Chrysler Bldg., New York, N. Y. Douglas D. Storey, Esq., Telegraph Bldg., Harrisburg, Pa.

For the Defendant: Clarence E. Dawson, Esq., Special Assistant to the Attorney General. Joseph E. Brennan, Esq., Assistant United States Attorney.

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PLAINTIFF'S EVIDENCE

Offer of pleadings

Mr. STOREY. Plaintiff offers in evidence paragraph one of the statement of demand and the corresponding paragraph of the affidavit of defense:

(Statement of Plaintiff's Demand.)

"1. That plaintiff at all times herein mentioned has been and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business at Annville, Lebanon County, Pennsylvania."

(Affidavit of Defense.)

"1. Admitted."

Mr. STOREY. Plaintiff offers in evidence paragraph two of the statement of demand and the corresponding paragraph of the affidavit of defense:

(Statement of Plaintiff's Demand.)

"2. That plaintiff duly filed its income and profits tax return for the calendar year 1920 with Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, on or about March 15, 1921, and paid the taxes shown on said return as follows: To said Ephraim Lederer, Collector, on March 14, 1921, \$13,120.50; on June 14, 1921, \$13,120.50; to Blakely D. McCaughn, Collector, successor to said Ephraim Lederer, on September 14, 1921, \$13,120.50; and on November 13, 1921, \$13,120.47; that said Ephraim Lederer ceased to hold office as Collector of Internal Revenue on July 31, 1921, and has not held said office since that date; that said Blakely D. McCaughn, ceased to hold office as Collector of Internal Revenue on December 31, 1927, and has not held said office since that date."

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(Affidavit of Defense.)

"2. Admitted except that the several dates of payment were respectively as follows: March 15, 1921, June 15, 1921, September 16, 1921, and December 15, 1921, and not as set forth in the Statement of Plaintiff's Demand."

Mr. STOREY. The plaintiff offers in evidence paragraph three of the statement of demand and the corresponding paragraph in the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand.)

"3. That prior to June 15, 1926, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have the taxes due for said taxable year 1920 determined and assessed within five years after the return was filed; that said waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924; that the Commissioner of Internal Revenue accepted and executed said waiver."

(Affidavit of Defense.)

"3. Admitted."

Mr. STOREY: The plaintiff offers paragraph four of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand.)

"4. That thereafter and on April 10, 1926, the Commissioner of Internal Revenue sent to plaintiff, by registered mail, a deficiency notice, pursuant to the provisions of Section 274 of the Revenue Act of 1926, claiming additional income and profits taxes, for the calendar year 1920 in the sum of \$1,362.50, and notifying plaintiff of its right, within sixty days after said date to file an appeal with the United States Board of Tax Appeals for a redetermination of said alleged deficiency; that plaintiff did not file an appeal with the United States Board of Tax Appeals."

(Affidavit of Defense.)

"4. Admitted."

Mr. STOREY. The plaintiff offers paragraph five of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand.)

"5. That thereafter, in July, 1926, the Commissioner of Internal Revenue assessed said amount of additional tax, and on July 26, 1926, plaintiff paid the tax, making the total paid for said year \$53,844.47."

(Affidavit of Defense.)

"5. Admitted."

Mr. STOREY. The plaintiff offers paragraph six of the statement of demand and the corresponding paragraph of the affidavit of defense.

Mr. DAWSON. No objection.

(Statement of Plaintiff's Demand)

"6. Thereafter, on or about March 23, 1929, within four years after the taxes for 1920 were paid, plaintiff filed with the Commissioner of Internal Revenue its claim for refund, on the Treasury Department Form 848, for \$53,844.47, overpayment of income and profits taxes for said calendar year 1920, with full statement of the grounds and reasons for refund in detail, and facts and evidence in support thereof."

(Affidavit of Defense.)

18 "6. Defendant admits that a document designated a claim for refund was filed by plaintiff on or about March 25, 1929, but shows unto the court that the only portion of the taxes for the year 1920, which had been paid by plaintiff within four years prior to the filing of said document, was the sum of \$1,362.50, and that said sum of \$1,362.50 has been refunded to plaintiff as plaintiff admits in Paragraph 8 of its Statement of Demand; that said document or alleged claim for refund was without force or effect as to any part of the taxes paid by plaintiff for the year 1920 other than said sum of \$1,362.50, and does not meet the conditions precedent which plaintiff must meet in order to institute or maintain this action; that the moneys which plaintiff seeks to recover herein having been paid by plaintiff as taxes for the year 1920, more than four years prior to the filing of said alleged claim for refund, this court is without jurisdiction herein."

Mr. STOREY. The plaintiff offers paragraph seven of the statement of demand and the corresponding paragraph in the affidavit of defense.

(Statement of Plaintiff's Demand.)

"7. That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of \$14,833.68, and that the correct amount of income and profits taxes for the said year was \$39,010.79, whereas plaintiff had been assessed and had paid the sum of \$53,844.47."

(Affidavit of Defense.)

19 "7. Defendant admits the averments in Paragraph 7 of Plaintiff's Statement of Demand but shows unto the Court that said averments are incomplete in that at the same time and in the same document which showed an overassessment of \$14,833.68, the Commissioner of Internal Revenue determined and declared that \$13,471.18 were barred from being refunded by the statute of limitations imposed by Congress on refunds of taxes."

Mr. DAWSON. No objection.

Mr. BRENNAN. They are all subject to the objection, for instance, paragraph six, that it isn't the best evidence. We will follow that up.

Mr. STOREY. The plaintiff offers paragraph eight of the statement of demand and the corresponding paragraph in the affidavit of defense.

(Statement of Plaintiff's Demand.)

"8. That thereafter, defendant refunded to plaintiff the sum of \$1,362.50, but withheld and kept, and still withholds and keeps from plaintiff the balance of said overpayment, in the sum of \$13,471.18, although plaintiff has demanded same."

(Affidavit of Defense.)

"8. Defendant admits the averments of Paragraph 8 of Plaintiff's Statement of Demand but shows that said averments are incomplete in that the moneys which plaintiff seeks to recover in this action are barred from recovery by plaintiff or from being refunded by the defendant as hereinbefore set forth."

Mr. DAWSON. No objection.

Mr. STOREY. The plaintiff rests.

Motion for nonsuit

Mr. BRENNAN. We move for a non-suit, your Honor.

The COURT. Motion denied. Exception for the defendant.

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DEFENDANT'S EVIDENCE

Offers in evidence

Mr. DAWSON. The defendant offers as Defendant's Exhibit No. 1 claim for refund for \$53,844.47, income tax for 1920, filed by the plaintiff in this action on or about March 25, 1929.

Mr. STOREY. No objection.

Mr. Dawson. Defendant offers in evidence as Defendant's Exhibit No. 2 a certified photostatic copy of certificate of over-assessment, allowing \$1,362.50 for the year 1920 to the A. S. Kreider Company, plaintiff in this action.

Defendant offers in evidence as Government's Exhibit 3 schedule of overassessment, dated September 9, 1929, No. IT 35778, showing refund of \$1,362.50, tax, and interest of \$30.39 to the plaintiff in this action.

Mr. STOREY. No objection.

(Government's Exhibit No. 3 is a part of Government's Exhibit No. 7, in the case between the same parties, No. 2926 January Term, 1932.)

Mr. DAWSON. The defendant rests.

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I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the notes taken by me on

the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ KENNETH L. POLLEY,
Shorthand Reporter.

Order

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

/s/ ALBERT L. WATSON,
District Judge.

30 (Execute separate form for each tax period.)

Claim for ☐ Abatement of tax assessed. ☐ Credit against outstanding assessments. ☒ Refund of taxes illegally collected. ☐ Refund of amounts paid for stamps used in error or excess. Collector's notation: District—. Account number—. Date received—. (Stamp here.) Collector of Internal Revenue.

Treasury Department, Internal Revenue Service. Form 843—
Jan. 1922. Comptroller General U. S. January 18, 1922.

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector: Collector must indicate in block above the kind of claim, except in Income Tax cases. Date received by Administrative Unit (Stamp here.)

STATE OF PENNSYLVANIA,

County of _____, ss:

THE A. S. KREIDER Co.,

Annaville, Pennsylvania.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged, Shoe Manufacturers. Period: From: Jan. 1, 1920, to: Dec. 31, 1920.

2. Character of assessment or tax (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased, \$53,844.47.

4. Reduction of Tax Liability requested (Income and Profits Tax), \$-----

5. Amount to be abated, \$-----

6. Amount to be refunded (or such greater amount as is legally refundable) \$53,844.47.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks). (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit \$-----.
11. Unpaid assessment against which credit is asked; period from ----- to ----- \$-----.

Deponent verily believes that this application should be allowed for the following reasons:

(1) That the Commissioner failed to allow an adequate amount representing wear, tear, exhaustion and/or obsolescence on taxpayer's physical assets; that a fair amount representing such deduction is \$65,471.02, and the Commissioner allowed \$38,777.22.

(2) That the Commissioner failed to include in taxpayer's invested capital a paid-in surplus in the amount of \$430,817.50 which it acquired upon incorporation.

There is attached hereto and made a part of this claim a sworn statement of facts outlining in detail the basis of the contentions as made above.

(Attach additional sheets if necessary.)

(Signed:) THE A. S. KREIDER CO.

By DONALD HORNE

Attorney in Fact.

Sworn to and subscribed before me this 23rd day of March, 1929.

C. G. MUTH,
Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

31 Schedule No.----- Claim No.-----

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

| NAME OF TAXPAYER. | Character of assessment and period covered. | List. | Year. | Month. | Page. | Line. | Amount. | Date paid. | District in which paid. |
|-------------------|---------------------------------------------|-------|-------|--------|-------|-------|---------|------------|-------------------------|
| ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- |
| ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- |
| ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- | ----- |

J. S. MacLAUGHLIN,
Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

| TO WHOM SOLD OR ISSUED. | Kind. | Number. | Denomination. | Date of sale or issue. | Amount. | If special tax stamp, state: | |
|-------------------------|-------|---------|---------------|------------------------|---------|------------------------------|--------------------|
| | | | | | | Serial number. | Period commencing— |
| | | | | | \$ | | |
| | | | | | | | |
| | | | | | | | |

Collector _____ District _____

Schedule Number _____ District _____
 Allowed or Rejected Number _____ Nature of tax _____
 Claimant _____
 Address _____

Examined and submitted for action _____, 19__

Amount claimed \$ _____

Amount allowed \$ _____

Amount rejected \$ _____

 Committee on Claims.

Claim examined by _____

Claim approved by _____

Chief of Division.

33 TREASURY DEPARTMENT, BUREAU OF INTERNAL REVENUE;
 INCOME TAX UNIT

The A. S. Kreider Company, Annville, Pennsylvania, for
 calendar year 1920

STATEMENT OF FACTS AND BRIEFS IN SUPPORT OF CLAIM FOR
 REFUND

Statement of Facts

It is contended that the Commissioner in the determination of taxpayer's net income for the said year 1920 erred in that he

failed to allow an adequate deduction representing wear, tear and exhaustion and/or obsolescence on taxpayer's physical assets. The facts upon which taxpayer relies are as follows:

Taxpayer's custom was to deduct depreciation upon no definite basis, usually determining the amount after computing the income for the year, and if such income was substantial would deduct a substantial amount for depreciation. If the income was not substantial the amount of depreciation would likewise be reduced. The inequitable result of this was further aggravated by the fact that taxpayer did not set aside amounts deducted for depreciation in a reserve account but merely
34 reduced the asset each year by the amount of the depreciation taken.

When taxpayer's return was audited for the year 1917 the Revenue Agent changed taxpayer's method to the reserve method, failing, however, to restore the depreciation which had been previously credited to the asset and using the diminished balance for the base on which to determine depreciation.

Subsequently taxpayer had its books examined in this connection and had all its physical assets reconstructed, that is, all reductions on account of depreciation were eliminated and the cumulative cost at the end of each year determined. The depreciation was then recomputed on a straight line basis and all amounts then deducted were set aside in a reserve account, due allowances being made for exhausted assets.

The results of this reconstruction are shown in the exhibits described below, which are attached hereto:

Exhibit No. 1—Schedule of Depreciable Assets, January 1, 1920, to December 31, 1920.

Exhibit No. 2—Schedule of Depreciable Assets and Depreciation Thereon for the Year 1920.

Exhibit No. 3—Schedule of Depreciation Reserve, January 1, 1920, to December 31, 1920.

The net result of this recomputation may be summarized as follows:

| 35 | Depreciation | | Increase |
|-----------------------------|--------------|-------------|------------|
| | Allowed | Corrected | |
| Buildings..... | \$2,493.38 | \$11,313.64 | \$2,820.26 |
| Machinery..... | 25,306.42 | 50,705.29 | 25,398.87 |
| Furniture and fixtures..... | 4,977.43 | 3,482.09 | 1,525.33 |
| Total..... | 22,777.22 | 65,471.02 | 26,693.80 |

In view of the above it is contended that taxpayer's net income for said year 1920 should be reduced in the sum of \$26,693.80.

The above contentions were submitted to the Bureau for the years 1917, 1918 and 1919, and adjustments were made by the Bureau in this respect in a stipulation dated November 14, 1928, Symbols GC:A:AC, and subsequently approved by the Board of Tax Appeals in its order of redetermination dated November 22, 1928. The figures contained in this brief are merely a continuation of the figures previously submitted and accepted by the Bureau.

In the same proceeding it was determined that a paid-in surplus of \$430,817.50 should be added to the invested capital previously determined by the Treasury Department, as shown by the stipulation above referred to and the order of redetermination entered by the Board of Tax Appeals pursuant thereto. This paid-in surplus results from the fact that stock having a par value of \$349,745.28 was, in 1915, issued for intangible assets, and that the tangible assets for which stock was issued had a fair market value exceeding the par value of the stock
36 issued therefor by \$349,745.28, in accordance with the doctrine of the appeal of St. Louis Screw Company, 2 B. T. A. 649; and the balance of \$81,032.22 of paid-in surplus is due to an increase in book values resulting from correcting the depreciation allowances of taxpayer's predecessor corporations. The invested capital adjustment requested is also a mere continuation of the application to 1920 of adjustments already made by the Bureau with respect to the years 1917, 1918 and 1919, amounting to \$430,817.50 as at incorporation. It is contended that in the computation of the tax for the said year 1920, the above amount should be included in taxpayer's invested capital.

It is also requested that the Treasury Department in its re-computation make due allowances for the correction of the amount of tax which was prorated on account of the subsequent redetermination of taxpayer's tax for the years 1917, 1918 and 1919.

Respectfully submitted.

THE A. S. KREIDER COMPANY
By A. S. KREIDER,

Its President.

37

STATE OF PENNSYLVANIA,
County of Lebanon, ss:

A. S. Kreider, being first duly sworn, deposes and says that he is the President of The A. S. Kreider Company, a corporation,

petitioner in the above-entitled appeal; that he has read the foregoing Statement of Facts and Brief and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

A. S. KREIDER.

Subscribed and sworn to before me this 20th day of March 1929.

C. E. SHENK,
Notary Public.

My Commission expires April 1, 1931.

I prepared the foregoing Statement of Facts and Brief from statements made to me by representatives of the taxpayer and from the official records and other papers and books of the taxpayer, and from which the mathematical computations were made, and I do not, of course, know of my own knowledge that all of the facts stated are true.

DONALD HORNE,
120 Broadway, New York, New York.

38

EXHIBIT No. 1

The A. S. Kreider Company, schedule of depreciable assets, Jan. 1, 1920, to Dec. 31, 1920

| Asset and branch | Balance per books Jan. 1, 1920 | Restoration of depreciation credited to asset | Adjustments | Corrected balance | Additions | Balance Dec. 31, 1920 |
|-------------------------------------|--------------------------------|-----------------------------------------------|-------------|-------------------|-------------|-----------------------|
| Buildings—Elizabethtown | \$59,800.00 | \$18,445.93 | | \$77,045.93 | \$10,269.33 | \$88,215.26 |
| Buildings—Annville | 46,500.00 | 15,635.51 | \$3,788.00 | 58,347.51 | 700.00 | 59,047.51 |
| Buildings—Middletown | 40,505.82 | 10,121.38 | | 50,627.20 | | 50,627.20 |
| Buildings—Lebanon "Turn" | 9,474.96 | 5,286.60 | 529.24 | 14,232.32 | 72,304.18 | 86,536.50 |
| Buildings—Lebanon "Welt" | 84,107.77 | 1,078.18 | | 85,185.95 | | 85,185.95 |
| Buildings—Philadelphia | 44,899.68 | 4,243.72 | | 49,143.40 | | 49,143.40 |
| Total | 285,288.23 | 54,513.32 | 4,317.24 | 335,484.31 | 83,273.51 | 418,757.82 |
| Machinery—Elizabethtown | 55,526.18 | 119,513.82 | 19,589.70 | 155,450.00 | 106.71 | 155,646.71 |
| Machinery—Annville | 22,625.06 | 89,932.89 | 10,222.81 | 102,334.94 | 5,126.28 | 97,208.66 |
| Machinery—Middletown | 53,377.35 | 26,338.54 | | 79,715.89 | 2,536.17 | 82,252.06 |
| Machinery—Palmyra | 15,451.92 | | | 15,451.92 | 36,458.12 | 51,910.04 |
| Machinery—Lebanon "Turn" | 6,595.63 | 48,831.83 | 7,398.59 | 47,578.57 | 3,446.35 | 44,131.72 |
| Machinery—Lebanon "Welt" | 81,803.52 | 7,811.38 | | 89,614.90 | 3,195.34 | 92,810.24 |
| Total | 235,379.65 | 291,977.66 | 37,211.10 | 490,146.22 | 33,513.21 | 523,659.43 |
| Furniture and fixtures—Philadelphia | 2,795.59 | 1,582.93 | | 4,378.52 | 213.69 | 4,592.21 |
| Furniture and fixtures—Chicago | 4,750.32 | 3,494.48 | | 8,244.80 | 1,910.61 | 10,155.41 |
| Furniture and fixtures—St. Louis | 5,747.03 | 2,444.64 | | 8,191.67 | 738.80 | 8,930.47 |
| Furniture and fixtures—New York | 4,776.87 | 2,832.59 | | 7,609.46 | 190.77 | 7,800.23 |
| Furniture and fixtures—Pittsburgh | 1,939.20 | 1,294.86 | | 3,234.06 | 77.62 | 3,311.68 |
| Furniture and fixtures—Boston | | | | | 2,593.24 | 2,593.24 |
| Total | 20,009.01 | 11,649.50 | | 31,658.51 | 5,724.73 | 37,383.24 |

EXHIBIT No. 2

The A. S. Kreider Co., schedule of depreciable assets and depreciation thereon for the year 1920

| | Buildings | Machinery | Furniture and fixtures |
|-----------------------------------------------------|--------------|--------------|------------------------|
| Balance Jan. 1, 1920 (per Exhibit 1)..... | \$335,484.31 | \$496,146.22 | \$31,658.51 |
| Additions (per Exhibit 1)..... | 83,273.51 | 33,813.21 | 5,724.73 |
| Balance Dec. 31, 1920 (per Exhibit 1)..... | 418,757.82 | 523,959.43 | 37,383.24 |
| Rate of depreciation..... | 3% | 10% | 10% |
| Depreciation on property in place Jan. 1, 1920..... | \$10,064.54 | \$49,014.62 | \$3,165.85 |
| Depreciation on additions (½ year)..... | 1,249.10 | 1,690.67 | 286.24 |
| Total depreciation..... | 11,313.64 | 50,705.29 | 3,452.09 |

SUMMARY OF DEPRECIATION

| | |
|-----------------------------|-------------|
| Buildings..... | \$11,313.64 |
| Machinery..... | 50,705.29 |
| Furniture and fixtures..... | 3,452.09 |
| Total..... | 65,471.02 |

EXHIBIT No. 3

The A. S. Kreider Co., schedule of depreciation reserve, Jan. 1, 1920, to Dec. 31, 1920

| Asset and branch | Balance Jan. 1, 1920 | Additions during year | Exhaustion adjustment | Balance Dec. 31, 1920 |
|--------------------------------|----------------------|-----------------------|-----------------------|-----------------------|
| Buildings: | | | | |
| Elizabethtown..... | \$23,973.30 | \$2,492.42 | ----- | \$26,465.72 |
| Annville..... | 21,731.36 | 1,760.93 | ----- | 23,492.29 |
| Middletown..... | 13,356.90 | 1,518.82 | ----- | 14,875.72 |
| Lebanon "Turn"..... | 6,062.45 | 1,511.53 | ----- | 7,573.98 |
| Lebanon "Welt"..... | 10,369.21 | 2,555.58 | ----- | 12,924.79 |
| Philadelphia..... | 5,254.66 | 1,474.36 | ----- | 6,729.02 |
| Total..... | 80,747.88 | 11,313.64 | ----- | 92,061.52 |
| Machinery: | | | | |
| Elizabethtown..... | 82,145.46 | 15,554.84 | \$4,525.73 | 93,174.57 |
| Annville..... | 61,479.23 | 9,977.18 | 7,558.38 | 63,898.03 |
| Middletown..... | 58,138.12 | 8,098.40 | ----- | 66,236.52 |
| Palmeira..... | 1,995.60 | 3,368.10 | ----- | 5,363.70 |
| Lebanon "Turn"..... | 28,051.90 | 4,585.51 | 3,490.40 | 29,146.92 |
| Lebanon "Welt"..... | 26,261.62 | 9,121.26 | ----- | 35,382.88 |
| Total..... | 258,071.93 | 50,705.29 | 15,574.60 | 293,202.62 |
| Furniture and fixtures: | | | | |
| Philadelphia..... | 1,266.94 | 448.54 | ----- | 1,715.48 |
| Chicago..... | 3,031.44 | 920.01 | ----- | 3,951.45 |
| St. Louis..... | 2,227.39 | 856.11 | ----- | 3,083.50 |
| New York..... | 2,320.57 | 770.45 | ----- | 3,091.02 |
| Pittsburgh..... | 1,133.11 | 327.29 | ----- | 1,460.40 |
| Boston..... | ----- | 129.66 | ----- | 129.66 |
| Total..... | 9,979.45 | 3,452.09 | ----- | 13,431.54 |

TREASURY DEPARTMENT

OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

Certificate of Overassessment

Income Tax Unit. IT:AR:D-8. REH. Number: 2,092,506.
 Allowed \$1,362.50. Schedule No. 35778. Ref. cl. filed 3/25/29.
 Received, Aug. 29, 1929, Claims Control Section.
 The A. S. KREIDER COMPANY,
 Annville, Pennsylvania.

SIRS:

An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the year 1920 indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:

| | |
|-----------------------------------------|-------------|
| Original, Account #422,472 | \$52,481.97 |
| Additional July 1926, Page 1, Line 5 #2 | 1,362.50 |
| Total assessment | 53,844.47 |
| Correct tax liability | 39,010.79 |
| Overassessment | 14,833.68 |
| Barred by Statute of Limitations | 13,471.18 |
| Overassessment allowable | 1,362.50 |

The adjustments shown in the accompanying schedules 1 to 5, inclusive, disclosing this overassessment of \$1,362.50 have been made upon the basis of facts and data now before the Unit in connection with a Revenue Agent's report.

In the determination of this overassessment, the statements made in your claim for the refund of \$53,844.47, corporation income and excess profits tax, for 1920, have been given careful consideration. Para OK HW.

This refund (or credit) is made in accordance with the provisions of Section 284 (b) of the Revenue Act of 1926. 4 yr. payt.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

District 1-Pa. 1sh-3. Interest: 257.44.

BUREAU RECORD COPY

Form 7920 sgd. by Commr..... 192.

Form 7920 sgd. by Collr..... 192.

Abated, \$-----

Overpayment, \$-----

Refunded, \$-----

Credited, \$-----

Action, Stamped; Initials, GRW; Date, 8/31/29.

Record of audit and review:

| | | |
|-----------------------------------------------|---------|---|
| Return audited:----- | Date | 9 |
| Reviewed (Unit): Eversfield----- | 8/20/29 | |
| Reviewed: Jno. W. Zimmerman, Review Section-- | 8/23/29 | |
| Approved: H. B. Robinson, Head of Division-- | 8/23/29 | |
| Approved: ----- | | |

Committee.

42

SCHEDULE

IT-A-#35778. The A. S. Kreider Company. Tax. Year, 1920.
(Name of taxpayer)

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions.
Show, in the ninth column, by symbols "Pd.", "Ab." or "Cr.", the
nature of each entry in the eighth column.

| Character of assessment and period covered (income tax) | List | Year | Month | Account No. or | | Amount assessed | Paid, abated, or credited | | Pd. Ab. Cr. |
|---------------------------------------------------------|------|------|--------|----------------|-------|-----------------|---------------------------|-------------|-------------|
| | | | | Page | Line | | Date | Amount | |
| 1920 | IT | 1921 | ----- | 422472 | ----- | \$52,481 97 | 3/15/21 | \$13,120 50 | Pd. |
| | | | | | | | 6/15/21 | 13,120 50 | Pd. |
| | | | | | | | 9/10/21 | 13,120 50 | Pd. |
| | | | | | | | 12/15/21 | 13,120 47 | Pd. |
| Add..... | IT | 1926 | July.. | 15-C#2 | ----- | 1,362 50 | 7/31/26 | 1,362 50 | Pd. |
| | | | | | | Int.. 30 39 | 7/31/26 | 30 39 | Pd. |
| Total..... | | | | | | \$53,874 86 | Total.. | \$53,874 86 | --- |

TAX LIABILITY

Year, 1920; correct tax liability, \$39,010.79; tax previously assessed, \$53,844.47; overassessment, \$1,362.50.

Full details of the adjustments producing the above-stated results based upon Revenue Agent's recommendations are contained in the attached Schedules 1 to 5, inclusive.

44 THE A. S. KREIDER COMPANY, YEAR ENDED DECEMBER 31, 1920

SCHEDULE 1—NET INCOME

| | |
|-----------------------------------------------|--------------|
| Net income as disclosed by return | \$406,750.03 |
| As corrected | 381,693.73 |
| Net adjustment | 25,056.30 |
| Unallowable deductions and additional income: | |
| (a) Contributions | \$245.00 |
| (b) Expenses capitalized | 200.00 |
| (c) Taxes | 840.00 |
| (d) Depreciation | 312.50 |
| Total | 1,597.50 |
| Nontaxable income and additional deductions: | |
| (e) Depreciation | 26,693.80 |
| Net adjustment as above | 25,056.30 |

SCHEDULE 2—EXPLANATION OF ITEMS CHANGED

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| (a) Contributions are not allowable deductions from net income. | |
| (b) Adding machine charged to expense is disallowed as deduction from income and restored to capital. | |
| (c) Taxes for the years 1914 to 1918, inclusive, are a liability for those respective years, therefore, are disallowed as a deduction for 1920 the year paid. | |
| (d) Excessive depreciation taken on trucks: | |
| Depreciation allowed 25% of \$450.00 | \$112.50 |
| Depreciation taken | 425.00 |
| Difference | 312.50 |
| 45 (e) Depreciation as computed in your brief dated March 20, 1929, accepted by the Bureau | \$65,471.02 |
| Depreciation taken on return | 38,777.22 |
| Adjustment | 26,693.80 |

SCHEDULE 3—INVESTED CAPITAL

| | |
|--------------------------------------|----------------|
| Invested capital disclosed by return | \$4,213,058.48 |
| As corrected | 4,680,573.54 |
| Net additions as explained below | 447,515.06 |

Additions:

| | |
|---------------------------------|------------|
| (a) 1916 income tax adjust..... | \$2,225.38 |
| (b) Paid-in surplus..... | 430,817.50 |
| (c) Capital expenditure..... | 463.18 |
| (d) Capital stock sold..... | 280.05 |
| (e) 1918 stock sold..... | 29,082.06 |
| (f) 1919 stock sold..... | 12,655.19 |

Total additions..... 475,473.36

Reductions:

| | |
|--------------------------|-----------|
| (g) Taxes..... | \$840.00 |
| (h) Inadmissibles..... | 358.89 |
| (i) 1917 additional..... | 26,759.41 |

Total reductions..... 27,958.30

Net additions as above..... 447,515.06

46

SCHEDULE 4—EXPLANATION OF ITEMS CHANGED

(a) Overassessment of \$2,225.38 for 1916 allowed, as an addition to invested capital.

(b) Paid-in surplus on the basis of corrected asset values at the date of organization (1915), in accordance with the principle in the appeal of St. Louis Screw Company, 2 B. T. A. 649, is allowed as follows:

| | |
|-------------------------------------------------------------------------------------------------------------------------|----------------|
| Total tangible assets as shown by books paid in to taxpayer upon organization (Brief dated August 1, 1928, Page 2)..... | \$1,260,941.91 |
| Increase in book values at organization due to revision of depreciable asset values (Brief of August 2, 1928)..... | 81,082.22 |

| | |
|--------------------------------------------------------------------------------------------------------------------|--------------|
| Total tangibles at organization as adjusted (Brief dated August 2, 1928, erroneously shown as \$1,341,934.03)..... | 1,341,974.13 |
| Cash value of intangible assets acquired for stock (Brief dated August 2, 1928)..... | 515,374.26 |

| | |
|------------------------------------------------|----------------|
| Total assets acquired for stock..... | 1,857,348.39 |
| Percentage of intangibles to total assets..... | 27.74% |
| Par value of stock issued at organization..... | \$1,260,941.91 |
| Par value issued for intangibles (27.74%)..... | 349,785.28 |

| | |
|--------------------------------------------------------|--------------|
| Balance issued for tangibles..... | 911,156.63 |
| Total tangible assets at organization as adjusted..... | 1,341,974.13 |

Paid-in surplus at organization based on adjusted asset values..... 430,817.50

(c) Capital expenditures charged to expense disallowed as a deduction.

(d) Common stock sold December 31, 1920, amount \$102,500.00 effective one day $\$102,500.00 \times 1/366$ average..... 280.05

47 (e) 1918 overassessment recommended by Special Advisory Committee.

| | |
|----------------------------------------------------------|------------|
| (f) 1919 Tax adjusted: | |
| Correct tax liability $\$489,594.96 \times 421448$ | 206,338.82 |
| Amount deducted in return..... | 218,994.01 |

Adjustment..... 12,655.19

- (g) Delinquent taxes to Middletown, Pennsylvania for the years 1914 to 1918, inclusive, are a liability.
 (h) Inadmissibles $\$4,660,932.43 \times 0.00077 =$ 358.89
 (i) 1917 deficiency as recommended by Special Advisory Committee.

SCHEDULE 5—COMPUTATION OF TAX, 1920 RATES

| | |
|----------------------------|--------------|
| Net income, Schedule | \$381,653.73 |
| Invested capital, Schedule | 4,660,573.54 |
| 8% of invested capital | 372,845.88 |
| Plus exemption \$3,000.00 | 3,000.00 |
| Total credit | 375,845.88 |

| | Income | Credit | Taxable | Rate | Tax |
|-----|--------------|--------------|------------|------|------------|
| 20% | \$381,653.73 | \$375,845.88 | \$5,807.85 | 20 | \$1,161.57 |

INCOME TAX

| | |
|---------------------------------------|--------------|
| Net income taxable year | \$381,653.73 |
| Less: Excess Profits Tax | 1,161.57 |
| Exemption | 2,000.00 |
| Balance taxable at 10% | 378,492.16 |
| Income Tax | \$37,849.22 |
| Total Income and Excess Profit Tax | 39,010.79 |
| Previously assessed, Account #422,472 | \$52,481.97 |
| July, 1928, Page 1, Line 5 | 1,362.50 |
| Overassessment | 53,844.47 |
| Barred by Statute of Limitations | 14,833.68 |
| Overassessment allowable | 13,471.18 |
| | 1,362.50 |

48

In United States District Court

[Title omitted.]

Defendant's motion for judgment

Filed August 14, 1936

Comes now the above-named defendant by Fredrick Follmer, United States Attorney, its attorney, and, after the close of the evidence in this case and before the court has considered, decided, or announced any decision herein, respectfully moves the court to enter judgment in favor of the defendant and against the plaintiff dismissing the plaintiff's statement of claim at plaintiff's costs upon the following grounds:

I

Under the pleadings, the evidence, and the undisputed facts in this case, defendant is entitled to judgment herein.

II

The pleadings and the evidence in this case, with every inference of fact that may be drawn therefrom are insufficient in law to warrant a judgment in favor of the plaintiff against this defendant.

III

This suit is barred by Section 1113 (a) of the Revenue Act of 1926 reenacting without change Section 3226 of the Revised Statutes, as amended.

49 Wherefore, By reason of the foregoing, the defendant moves the court for judgment in its favor dismissing the plaintiff's suit at plaintiff's costs, and respectfully requests that exceptions be granted this defendant in the event this motion for judgment is overruled by the court.

Respectfully submitted.

(Signed) FREDERICK V. FOLLMER,
United States Attorney.

51

In United States District Court

[Title omitted.]

Opinion and order

August 26, 1936

This suit was brought to recover Internal Revenue Taxes alleged to have been erroneously and illegally assessed and collected.

By an Affidavit of Defense, by a motion for a nonsuit after the Plaintiff rested, by a motion for a directed verdict in favor of the Defendant, and by a motion for judgment in favor of the Defendant and against the Plaintiff after the evidence was all in and before the Court had reached any decision, the Defendant raised the question of the Statute of Limitations.

The Applicable Statute (R. S. sec. 3226, amended, 26 U. S. C. A. sec. 156), provides that "no such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

52

The facts are not seriously in dispute. On March 15, 1921, Plaintiff filed its income tax return for the calendar

year 1920. This return showed income taxes payable in the sum of \$52,481.97, which amount was paid in four quarterly installments in the year 1921. Prior to June 15, 1926, Plaintiff filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for 1920 to December 31, 1926. On April 10, 1926, the Commissioner of Internal Revenue advised the Plaintiff by registered mail of a deficiency for this year in the amount of \$1,362.50. No appeal was taken to the Board of Tax Appeals, and, on July 10, 1926, the deficiency was assessed. The additional tax of \$1,362.50 was paid on or about July 28, 1926. On or about March 25, 1929, the Plaintiff filed a claim for refund for all of the taxes paid for the year 1920. This claim was allowed for the sum of \$14,833.68. Thereafter, Defendant refunded to Plaintiff the sum of \$1,362.50, and retained the sum of \$13,471.18.

The Commissioner of Internal Revenue signed the schedule of overassessment, 35778, on September 9, 1929, and, shortly thereafter, notified Plaintiff of the disallowance of the amount for which this suit is brought. Plaintiff admits such notice was received in October 20, 1929.

The Plaintiff completed the payment of the taxes for 1920 on July 28, 1926. This suit was begun March 7, 1932. It is apparent that this suit was not begun before the expiration of five years from the date of payment of the tax.

53 As the suit was begun more than five years after the tax was paid, the only other provision under which it might be timely is that which permits a suit or proceeding "within two years after the disallowance of a part of such claim to which such suit or proceeding relates." This suit is not timely under this provision. The disallowance was made by the Commissioner on September 9, 1929, when he signed the schedule of overassessment, and the Plaintiff was advised of the disallowance in October 1929. If it is assumed that October 31, 1929 was the date when the disallowance was made, two years after that date would be October 31, 1931. The Plaintiff's suit was not begun until March 7, 1932.

This suit was begun too late, and Defendant's motion for judgment should be granted.

Now, August 26, 1936, Defendant's motion for judgment is granted, and judgment is directed to be entered in favor of the Defendant and against the Plaintiff.

(S) ALBERT L. WATSON,
United States District Judge.

54

In United States District Court

[Title omitted.]

Notice of appeal

Filed October 15, 1936

The A. S. Kreider Company, Plaintiff in the above-entitled action, hereby appeals from the judgment entered in the above entitled proceeding in favor of the Defendant on the 26th day of August, A. D. 1936.

(S) DOUGLASS D. STOREY,
Douglass D. Storey,

(S) DONALD HORNE,
Donald Horne,
Attorneys for Plaintiff.

HARRISBURG, PA., *October 10, 1936.*

55 In United States Circuit Court of Appeals, for the
Third Circuit.

No. 6295. March Term, 1937

A. S. KREIDER COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Upon Appeal From the District Court of the United States for
the Middle District of Pennsylvania

Opinion

Filed May 23, 1938

Before BUFFINGTON, THOMPSON, and BIGGS, Circuit Judges.

THOMPSON, Circuit J.: This is an appeal from a judgment of the District Court for the Middle District of Pennsylvania. The taxpayer filed its income and profits tax return for 1920 and 1921 and paid the taxes in quarterly instalments in that year. Waivers filed prior to June 15, 1926, extended the time for assessment of taxes to December 31, 1926. In April 1926 the Commissioner sent a deficiency notice claiming additional income and profits taxes for 1920 in the sum of \$1,362.50. In July 1926 the

Commissioner assessed the additional tax which was paid in the same month. In March 1929 the taxpayer filed a claim for refund. In September 1929 the Commissioner filed a schedule of overassessment as follows:

"Tax assessed:

| | |
|--------------------------------------|-------------|
| Original, Account No. 422,472 | \$52,481.97 |
| Additional July 1928, Page 1, Line 5 | 1,362.50 |
| Total assessment | 53,844.47 |
| Correct tax liability | 39,010.79 |
| Overassessment | 14,833.68 |
| Barred by Statute of Limitations | 13,471.18 |
| Overassessment allowable | 1,362.50 |

* * * * *

Certificate of Overassessment:

Number: 2,002,506.
 Allowed: \$1,362.50.
 Schedule No. 35778."

The schedule was received by the taxpayer not later than October 1929 and was accompanied by a check for \$1,362.50, with interest. In March 1932 the taxpayer instituted suit to recover \$13,471.18, with interest, alleged to have been wrongfully withheld by the United States. At this time the Collectors to whom payments had been made were not in office.

The statute invoked by the taxpayer as authority for this suit, commonly known as the Tucker Act, Paragraph 20, Section 24 of the Judicial Code (28 U. S. C. A. 41 (20)) reads:

"Section 41. The district courts shall have original jurisdiction as follows:

(20) Concurrent with the Court of Claims, of all claims
 56 not exceeding \$10,000 * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

This statute granted a taxpayer the right to bring suit in the District Courts for tax refunds naming the United States as de-

fendant even though the amount involved exceeded \$10,000 if the Collector to whom payments were made was dead or out of office at the time of suit. Although it is conceded that each of the prerequisites to jurisdiction exists in the instant case the defense is that the statutory period for suit had expired. The United States relies upon R. S. 3226 (26 U. S. C. A. 156) which provides:

"No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit such or proceeding relates. * * *"

It is obvious from an examination of the relevant dates that whether we consider November 1921, when the original tax was paid, or July 1926, when the deficiency was assessed and paid, as the date of the last payment, more than five years from the last payment elapsed prior to suit. It is equally obvious that more than two years elapsed from the date of disallowance of the claim for refund.

R. S. 3226, however, has been amended by the Tucker Act, supra, so as to permit six years from the final date of payment as the time within which suit may be commenced, when the suit is against the United States and is brought in the District Court. The suit in the instant case was timely within the six-year statutory period. As was said by Mr. Justice Black in *Bates Manufacturing Company v. United States of America*, U. S. (opinion filed March 28, 1938):

"The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a construction under which a claimant's rights would be preserved by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court."

Inasmuch as the Court below decided the procedural issue without passing upon the merits, the judgment is reversed and the cause remanded to the District Court with directions to consider and determine the merits of the controversy.

Dissenting opinion

Biggs, Circuit Judge, (Dissenting): Upon March 15, 1921, the appellant filed its income tax for the calendar year 1920 with the Collector of Internal Revenue for the First District of Pennsylvania. The return so made by the appellant showed income tax due and payable by it in the sum of \$52,481.97, which it proceeded to pay in four quarterly instalments.

Before June 15, 1926, the appellant filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for the year 1920, to December 31, 1926.

Upon April 10, 1926, the Commissioner of Internal Revenue informed the appellant in the manner prescribed by law that a deficiency existed in tax paid for the year 1920 in the amount of \$1,362.50. Upon July 10, 1926, no appeal having been taken by the appellant to the Board of Tax Appeals, the deficiency was duly assessed by the Commissioner. The amount of the additional tax, viz., \$1,362.50, was paid by the appellant upon July 28, 1926; that is to say the appellant completed the payment of taxes for the year 1920 on July 28, 1926. Upon March 25, 1929, the appellant filed a claim for refund for all of the taxes paid for the year 1920, viz., \$53,844.47, composed of two items, the \$52,481.97 paid in four quarterly instalments and the additional tax paid July 28, 1926, in the sum of \$1,362.50.

Upon September 9, 1929, the Commissioner signed a schedule of overassessment showing a "net amount refundable" to the appellant in the sum of \$1,362.50, with interest. The certificate of overassessment was duly mailed to the appellant and is set forth in the majority opinion.

A check in the sum of \$1,362.50, with interest, accompanied the certificate of overassessment and was received by the appellant at the same time the certificate of overassessment was received.

A comparison of dates makes it evident that, since the suit at bar to recover the sum of \$13,741.18, with interest, was commenced on March 7, 1932, and the last payment was made upon July 28, 1926, that more than five years elapsed from the date of the payment of the tax to the date of the commencement of the suit. It also appears that since the day of the issuance of the certificate of overassessment was in September, 1929, and the certificate of overassessment was received by the appellant in October, 1929, that more than two years elapsed from the time of the disallowance of that part of the claim of the appellant here sued for to the date of the suit. The District Judge therefore deemed the statute of limitations imposed by the provisions of R. S. 3226, as reenacted by Section-1113 (a) of the Revenue

Act of 1926, c. 27, 44 Stat. 9,¹ to be applicable, and rendered judgment for the appellee.

The appellant contends, however, that paragraph 20 of Section 24 of the Judicial Code, the Tucker Act (28 U. S. C. A. 58 41 (20)),² with its provision for the commencement of actions within six years, governs the action at bar, and that the provisions of Section 3226 of the Revised Statutes, as amended, including the statute of limitations contained therein, heretofore referred to, have no application.

Now the appellant's statement of demand sets forth that the sum of 13,471.18 is due it by reason of the overassessment in the sum of \$14,833.68 expressed upon the certificate of overassessment issued by the Commissioner. Of this total, as we have stated heretofore, \$1,362.50 was paid to the appellant. The appellant therefore by the very nature of its pleading bases its cause of action upon the record of the certificate of overassessment, and therefore to recover must bring that cause of action within the rule enunciated by the Supreme Court in *Bonwit-Teller Company v. United States*, 283 U. S. 258; 265; *Daube v. United States*, 289 U. S. 367, 372; and in *Stearns Company v. United States*, 291 U. S. 54, 65. See also *United States v. Real Estate Savings Bank*, 104 U. S. 728, 733; *United States v. Kaufman*, 96 U. S. 567, 570.

The rule of law applicable to the case, at bar to be deduced from the cited cases may be stated in substance as follows: Section 24 (20) of the Judicial Code, the Tucker Act, confers jurisdiction concurrent with the Court of Claims upon the District Courts to

¹"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue. . . . but such suit or proceeding may be maintained whether or not such tax . . . has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of payment of such tax. . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates . . ."

²"Sec. 24. The district courts shall have original jurisdiction as follows:

"Twentieth. Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. . . . No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. . . . All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

entertain suits for sums not exceeding \$10,000, founded upon "any contract, express or implied," with the Government of the United States. Suit therefore may be maintained in a District Court under the provisions of the Tucker Act, if the amount involved does not exceed \$10,000, provided the circumstances are such as to import a promise of payment by way of refund of tax by the United States and the acceptance of such refund by the taxpayer. If, however, the amount involved in the suit does exceed \$10,000, then suit must be brought in the Court of Claims and may not be brought in a District Court.

The amendment of November 23, 1921, to Section 24 (44 Stat. 121) does not permit a District Court to entertain a suit against the United States unless the suit be of such a nature that it could have been brought against the Collector while he was still in office; that is to say unless the suit is of a personal nature to the Collector. The amendment permits the bringing of only such suits as might have been brought against the Collector if he were still in office. A suit on account stated cannot be brought against a Collector, since a Collector has no power to state an account between the United States and a taxpayer after payment of taxes by the latter or any power to allow a refund to the taxpayer. *Moses v. United States*, 61 F. (2nd) 791; *Otis Elevator Co. v. United States*, 18 F. Supp. 87. An examination of the record in the case at bar indicates plainly that the suit brought by the appellant is not such a suit as could have been brought against the Collectors of Internal Revenue for the First District of Pennsylvania, to whom the appellant paid its taxes, even had they remained in office, for the appellant's suit is based upon the certificate of overassessment issued by the Commissioner of Internal Revenue.

This is apparent both from the record of the case and the brief of the appellant. Upon the appellant's brief the following is stated: "The appellant contends that the two-year statute has no application because, in cases where it does apply, the two-year period starts with the date of disallowance of the claim for refund, and in this case the claim for refund was allowed, not disallowed." The appellant, in its statement of demand,³ relies upon an alleged allowance by the Commissioner of the sum of \$14,833.68, as expressed in the certificate of overassessment. An examination of the certificate of overassessment, however, shows that the sum of \$13,471.18 was not allowed by the Commissioner. Expressly, it is shown as "barred by statute of limitations."

³ Paragraph 7 of the Statement of Demand is as follows: "That thereafter the Commissioner of Internal Revenue considered said claim for refund, and determined that the taxes for 1920 had been overassessed and overpaid in the sum of \$14,833.68, and that the correct amount of income and profits taxes for said year was \$39,010.79, whereas plaintiff had been assessed and had paid the sum of \$53,844.47."

There are therefore two reasons why the appellant cannot maintain its suit at bar. It has pleaded a case based upon an account stated and has failed to prove it. It has brought its action in the wrong court, in the District Court instead of in the Court of Claims, since it seeks to recover more than \$10,000 upon an account stated.

The judgment of the court below should be affirmed.

A true Copy:

Teste:

*Clerk of the United States Circuit Court of Appeals
for the Third Circuit.*

61 *Mandate from Circuit Court of Appeals*

UNITED STATES OF AMERICA, ss:

The President of the United States of America, To the Honorable the Judges of the District Court of the United States for the Middle District of Pennsylvania.

[SEAL]

Filed July 28, 1938

Greeting: Whereas, lately in the District Court of the United States for the Middle District of Pennsylvania, before you or some of you, in a cause between A. S. Kreider Company, plaintiff below (appellant), and United States of America, defendant below (appellee)—No. 2927 January Term, 1932—an order was entered in the said District Court on August 26, 1936, which order is of record in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

62 And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and the cause remanded to the said District Court with directions to consider and determine the merits of the controversy.

Philadelphia,

MAY 23, 1938.

64 In United States District Court for the Middle District of Pennsylvania

No. 2927. January Term, 1932

THE A. S. KREIDER COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Opinion

(Filed December 19, 1939)

This case is now before the Court for determination of Plaintiff's claim on its merits.

The facts in the case are not seriously in dispute and were found by the Court in a prior opinion filed August 26, 1936. The Court now finds the facts specially as follows:

March 15, 1921, the Plaintiff filed its income tax return for the calendar year 1920.

This return showed income taxes payable in the sum of \$52,481.97, which amount was paid in four quarterly installments in the year 1921.

Prior to June 15, 1926, Plaintiff filed an income and profits tax waiver, extending the statutory period of limitations for assessment of taxes for 1920 to December 31, 1926.

April 10, 1926, the Commissioner of Internal Revenue advised the Plaintiff by registered mail of a deficiency for this year in the amount of \$1,362.50

65 No appeal was taken to the Board of Tax Appeals, and, on July 10, 1926, the deficiency was assessed.

The additional tax of \$1,362.50 was paid on or about July 28, 1926.

On or about March 25, 1929, the Plaintiff filed a claim for refund of part of the taxes paid for the year 1920, \$13,471.18 of which was paid in 1921, and \$1,362.50 of which was paid in 1926.

The Plaintiff was overassessed in the sum of \$1,362.50 paid in 1926, and \$13,471.18 paid in 1921.

Thereafter, Defendant refunded to Plaintiff the sum of \$1,362.50 paid in 1926, with interest, but did not refund the sum of \$13,471.18 paid in 1921.

This action was instituted March 1932 to recover the sum of \$13,471.18 with interest, of which \$13,120.47 was paid on November 13, 1921, and \$350.71 on September 14, 1921.

DISCUSSION

The Circuit Court of Appeals for this circuit has ruled in this case that this action was brought within the period of the statute of limitations and that this Court has jurisdiction. The mandate of the Circuit Court of Appeals directed that the case now be determined on its merits.

Inasmuch as the overassessment is not disputed, the sole question before the Court is whether or not the Commissioner of Internal Revenue correctly ruled that the overassessment was barred by the Statute of Limitations. That portion of the Revenue Act of 1926, c. 27, 44 Stat. 66, which is pertinent to the facts of this case provides as follows:

66 "284 (b). Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim or, if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(g) If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid."

In the present case, the claim was not filed on or before April 1, 1927, and, therefore, it is governed by the provision of (g) regarding claims filed within four years from the time the tax was paid.

It is the contention of the government that the provision of (g) here involved, is qualified by subdivision (b) (2), and that only that portion of the tax paid within four years of the claim may be recovered. Such is the construction which the Commissioner of Internal Revenue apparently placed upon this act, in view of the fact that he allowed only that amount which had been paid within four years of the filing of Plaintiff's claim.

The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitations, is the date upon which the final payment was made, and the words "the tax" refer to the entire tax and not a portion thereof. *Hills vs. U. S.* 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001; *Clarke v. U. S.* 69 F. (2d) 748.

67 In *Weinburg vs. U. S.*, 25 F. Supp. 83, the question here presented was decided by the Court of Claims and the Court held that the claimant was limited to that portion of the tax paid within four years of the filing of the claim. The decision of the Court of Claims was based largely upon a report of the Senate Committee which first inserted a provision similar to subdivision (b) (2) of the Act under consideration. That report stated that the committee, by the new provision, intended to prevent the extension of the Statute of Limitations by the payment of a small portion of the tax. However, that report dealt with a different statute and was not directed to the particular provision here involved and cannot be given such force and effect as to controvert the clear provisions of this statute. Furthermore, there was no indication of the committee's intention in cases where the taxpayer has filed a waiver of his rights in favor of the United States. In such case, the committee and Congress may well have felt that additional and exceptional rights should be accorded to the taxpayer. That this is true is indicated by the provision permitting claims for the entire tax to be filed on or before April 1, 1927, for taxes for the taxable year 1920 or 1921. The *Weinburg* case recognizes the right to recover the entire amount of the overpayment under those circumstances. There is little, if any, reason to assume that Congress did not also intend to permit the recovery of the entire overpayment where a claim was filed within four years from the time of the payment of the last installment of the tax.

That Congress did intend that the entire overpayment be recovered is further evidenced by the fact that subdivision (g) was specifically excepted in its entirety from the provisions of
68 subdivision (b). The enactment of (b) (2) clearly shows that Congress knew that the claimant could recover the entire overpayment whether paid within four years of the filing of the claim or not unless express limitation were inserted. This recognition of the judicial construction of the terms used and the fact that no limitation was placed upon the provisions of (g) indicates that Congress did not intend to limit recovery of claims brought under either alternative of (g).

In *Weinburg vs. U. S.*, supra, the Court, dealing with taxes paid for the taxable year 1917, said: "The only exception which subdivision (g) made to the general rule stated in (b) (1) and (2) with reference to the filing of claims and the making of refunds was that a taxpayer who had filed a waiver of the statute of limitations could obtain a refund of an overpayment for 1917 even though paid more than four years prior to the filing of the claim, if the claim was filed on or before April 1, 1925." I cannot agree with this statement. Subdivision (g) contains two exceptions which are connected by the words "either * * * or" and must be given equal effect. Subdivision (g) provides that claim may be made *either* on or before April 1, 1925, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.

Furthermore, if the provision "or within four years from the time the tax was paid," were construed as in the *Weinburg* case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction.

69

CONCLUSIONS OF LAW

Subdivision (g) of section 284 of the Revenue Act of 1926 means that where a waiver in respect of the taxes due for the taxable year 1920 or 1921 has been filed, claims for the refund of all overpayments of tax for the taxable year 1920 or 1921 may be filed either on or before April 1, 1927, or within four years from the time the last installment of the tax was paid, and in either case the entire amount of the overpayments may be recovered whether or not all of the overpayments were made within four years prior to the time the claim was filed.

The Plaintiff is entitled to recover the entire amount of the overassessment paid to the Defendant for the taxable year 1920, and no part thereof is barred by the Statute of Limitations.

The Plaintiff is entitled to judgment against the Defendant in the sum of \$13,471.18, with interest at the rate of 6 percent, on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921.

Now, December 19, 1939, judgment is directed to be entered in favor of the Plaintiff and against the Defendant in the sum of \$13,471.18, with interest at the rate of six percent, on \$13,120.47 from November 13, 1921, and on \$350.71 from September 14, 1921.

[S] ALBERT L. WATSON,
United States District Judge.

In District Court of the United States for the Middle
District of Pennsylvania

No. 2927. January Term, 1932

THE A. S. KREIDER COMPANY

vs.

UNITED STATES OF AMERICA

Judgment

Clerk's Docket Entry of December 19, 1939

1939

Dec. 19—Opinion and

Order, Judgment is directed to be entered in favor of the plaintiff, and against the defendant in the sum of \$13,471.18 with interest at the rate of six percent on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921. (W) Judgment entered in favor of the plaintiff, A. S. Kreider Company and against the defendant, United States of America, in the sum of \$13,471.18, with interest at the rate of six percent on \$13,120.47 from November 13, 1921 and on \$350.71 from September 14, 1921.

Notice of entry of judgment mailed Frederick V. Follmer, United States Attorney.

71

In United States District Court

[Title omitted.]

Notice of appeal

Filed March 8, 1940

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the following judgment:

Now, December 19, 1939, judgment is directed to be entered in favor of the plaintiff and against the defendant, in the sum of \$13,471.18 with interest at the rate of 6% on \$13,120.47 from November 13, 1921, and on \$350.71 from September 14, 1921.

(Signed) ALBERT L. WATSON,

United States District Judge.

entered in this action on December 19, 1939.

[S] FREDERICK V. FOLLMER,

United States Attorney,

424 Federal Building, Scranton, Penna.

72 In United States Circuit Court of Appeals for the Third
Circuit

No. —

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

v.
THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE*Appellant's statement of points*

Filed April 5, 1940

Comes now the United States of America by Frederick V. Follmer, United States Attorney, defendant-appellant in the above-entitled cause, and with its appeal from the District Court's order for a judgment in favor of the plaintiff states and files the following points upon which it relies to reverse the said judgment:

1. The plaintiff's suit was barred by the statute of limitations.
2. Plaintiff's claim for refund was not filed in time to permit the refund of the taxes ordered refunded by the judgment of the District Court.
3. The District Court was without jurisdiction to hear and determine this suit.
4. The District Court erred in failing to dismiss this suit at the cost of the plaintiff.

(Signed) **FREDERICK V. FOLLMER,**
United States Attorney.

By **JOSEPH S. SHERMAN,**
Assistant United States Attorney.

Filed _____, 1940.

Clerk.

73 In United States District Court

[Title omitted.]

Appellant's designation of contents of record

Comes now the United States of America, defendant herein, by Frederick V. Follmer, United States Attorney for the Middle District of Pennsylvania, and designates that the complete record

and all of the proceedings and evidence in the District Court in this action be included and contained in the record on appeal.
Dated at Scranton, Pennsylvania, this 5th day of April 1940.

FREDERICK V. FOLLMER,
*United States Attorney,
Attorney for Appellant.*

Received a copy of the foregoing designation of record this 30th day of March 1940.

(Signed) DONALD HOWE,
(Signed) DOUGLAS D. STOREY,
Attorneys for the Appellee.

74

In United States District Court

[Title omitted.]

Stipulation as to record

Filed April 5, 1940

Now, March 30, 1940, it is stipulated and agreed by and between counsel for the Appellant and Appellee in the above matter, which has been appealed to the Circuit Court of Appeals of the United States for the Third Circuit, that the following be omitted from the printed record on this Appeal:

1. Petition for appeal;
2. order allowing appeal;
3. assignment of errors;
4. amended assignment of errors;
5. citation;
6. praecipe, order and supplemental praecipe and order.

(Signed) DOUGLAS D. STOREY,

(Signed) DONALD HOWE,

*Attorney for the A. S. Kreider Company,
Plaintiff, Appellee.*

(Signed) FREDERICK V. FOLLMER,

*United States Attorney,
Attorney for Defendant, Appellant.*

75

[Clerk's certificate to foregoing transcript omitted in printing.]

76 In United States Circuit Court of Appeals for the
Third Circuit

No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Minute entry of hearing

And afterwards, to wit, the 25th day of October 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of December 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

77 In United States Circuit Court of Appeals for the
Third Circuit

No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal From the District Court of the United States for the
Middle District of Pennsylvania

Opinion

Filed December 17, 1940

Before CLARK, JONES, and GOODRICH, Circuit Judges.
JONES, Circuit Judge. The plaintiff filed suit in the District Court against the United States to recover an overpayment of income taxes for the year 1920 which had theretofore been

determined by the Commissioner of Internal Revenue but had been withheld by him from certification for refund on the ground that the taxpayer's claim was filed belatedly.

By its affidavit of defense and various motions for summary judgment, the defendant asserted that the suit was barred by the statute of limitations and that the District Court was also without jurisdiction by reason of Section 3226 of the Revised Statutes.¹ The District Court, concluding that the suit had been instituted too late, entered judgment for the defendant. An appeal followed and this court then held, one judge dissenting, that Sec. 3226 R. S. was impliedly amended by the Tucker Act (Judicial Code, Sec. 24, par. (20)²) "so as to permit six years from the final date of payment as the time within which suit may be commenced, when the suit is against the United States and is brought in the District Court." See 97 F. 2d 387, 388. As the suit had been instituted within the six year period, the judgment was accordingly reversed and the cause remanded with directions to the District Court "to consider and determine the merits of the controversy."

At the ensuing trial the only defense interposed was that the plaintiff's right to refund for the amount of the overassessment in suit was barred by Sec. 284 (b) and (g) of the Revenue Act of 1926. The claim for refund had been the occasion of the Commissioner's determination of the overassessment for which the plaintiff seeks recovery. The trial court, being of the opinion that the claim had been filed timely, entered judgment for the plaintiff (the amount of the unrefunded overassessment not being in dispute). Thereupon, the defendant took the present appeal.

Although the matter now here for review is the action of the court below in confirming the timeliness of the taxpayer's claim

¹ Section 3226 of the Revised Statutes, as amended, which was reenacted without change by Sec. 1113 (a) of the Revenue Act of 1926, 26 U. S. C. A. Int. Rev. Acts, p. 324, provides, *inter alia*, that,—

"Sec. 3226. . . . No suit or proceeding [i. e., for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected] shall be begun . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

² Section 24 of the Judicial Code (28 U. S. C. A. § 41) provides, in material part, by paragraph (20) that the original jurisdiction of the District Courts shall extend, concurrent with the Court of Claims, to "any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. . . . No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. . . ."

for refund, the appellant asks us to reconsider and reverse the former decision of this court with respect to the period of limitations applicable to the institution of the suit and the question of the District Court's jurisdiction. This, we may not justifiably do, even though we should now be inclined to disagree with the former decision. (No implication of any such disagreement on our part is intended.) The court below faithfully followed this court's mandate, as it was bound to do. Thereby it was precluded from reconsidering the matters which the appellant seeks to reopen here. Cf. *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255, 256. See also *Federal Communications Commission v. Pottsville Broadcasting Co.*, U. S. . The former decision of this court became the law of the case and, once the law of a case is settled by an appellate court, it is settled for that tribunal, as well as for the trial court, save for new or different facts. *Toucey v. New York Life Insurance Co.*, 112 F. 2d 927, 928 (C. C. A. 8). To reverse the court below in a wholly unchanged factual situation, for doing what this court directed should be done would, to say the least, be a positive disservice to the orderly administration of justice. A second appeal may not be used to raise questions in the same case already put at rest by the same court upon a prior appeal. *Toucey v. New York Life Insurance Co.*, supra.

Coming then, to the one question properly within the scope of the present appeal, we think that the court below correctly held that the claim for refund was filed in time and that the plaintiff is entitled to recover the overpayment of taxes in the amount determined by the Commissioner which still remains unrefunded.

The plaintiff, a Pennsylvania corporation, filed its income tax return on March 15, 1921 for the calendar year 1920 and paid the taxes due, as shown thereon, in equal quarterly installments during the year 1921. The Collectors to whom this tax was paid were not in office at the time the suit herein was filed. Prior to June 15, 1926, the plaintiff filed an income and profits tax waiver extending the statutory period of limitations for the assessment of taxes for the year 1920 to December 31, 1926. On April 10, 1926, the Commissioner of Internal Revenue advised the plaintiff of a deficiency in tax for the year in question in the sum of \$1,362.50, which was thereafter duly assessed and, still later, paid by the plaintiff on July 28, 1926. On March 25, 1929 (which was within four years after payment of the final portion of its 1920 taxes) the plaintiff filed a claim for refund of part of the taxes paid for

the year 1920, \$13,471.18 of the amount claimed having been paid in 1921 and \$1,362.50 on July 28, 1926, as above stated. On September 9, 1929, the Commissioner signed a Schedule of Overassessments which showed a "net amount refundable" to the plaintiff in the sum of \$1,362.50 with interest. A check for this amount was later mailed to the plaintiff along with a certificate of overassessment showing that the total overassessment was \$14,833.68 but that \$13,471.18 thereof was barred by the statute of limitations. The difference represented the amount of the refund then made. The plaintiff received the check and certificate of overassessment in October 1929. On March 7, 1932, the plaintiff filed its statement of claim in the suit below to recover the unrefunded balance of the overassessment as shown by the certificate. Whether the plaintiff is entitled to recover depends upon whether or not the Commissioner was correct in his conclusion that \$13,471.18 of the plaintiff's claim for refund was barred by the statute of limitations under the pertinent Revenue Act (1926).

The portions of the Revenue Act (1926, c. 27, 44 Stat. 9, 26 U. S. C. A. Int. Rev. Acts, pp. 220, 222) which are material to the present question are as follows:

"Sec. 284. * * *

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

81 "(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

"(g) * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver [an income and profits tax waiver extending the statutory period of limitations for assessment of taxes] in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *"

As the plaintiff's claim for refund was actually filed on March 25, 1929, it was obviously not filed within the period which expired on April 1, 1927. However, it was filed within four years of the plaintiff's payment on July 28, 1926 of the final portion of the tax due for the year 1920. But, the appellant contends that a claim for refund within the alternate period of four years, prescribed by subsection (g), is limited by subsection (b) (2) to such taxes as were paid within that period. Apparently, the Commissioner of Internal Revenue acted upon a like construction of the statute when he certified for refund merely the portion of the tax paid by the plaintiff within the four year period instead of the whole of the determined over-assessment of the taxes paid for the taxable year. No reasonable basis for the distinction is apparent. The appellant admits that, had the claim for refund been filed prior to April 1, 1927, a claim for the refund of the whole of the tax paid for the particular tax year could have been made. Why, then, may the overassessment not be reclaimed, without regard for the amount of the portion of the tax paid within the four year period, when the claim is filed within four years of the payment of the final portion of the tax for the particular year?

Subsection (g) specifically provides that, where a taxpayer has duly filed the required waiver with respect to the time for the assessment of a tax, a "refund relating to the taxes for the taxable year 1920 * * * shall be * * * made if claim therefor is filed * * * within four years from the time the tax was paid. * * *." [Italics supplied.] By "the tax", the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. *Hills v. United States*, 50 F. 2d 302, 305-307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001; *United States v. Clarke*, 69 F. 2d 748, 750 (C. C. A. 3); *Union Trust Co. of Rochester v. United States*, 70 F. 2d 629, 630 (C. C. A. 2). The fact that the cases last cited involved claims for the refund of estate taxes does not impair the applicability of the principle that the period of limitations with respect to suit for the recovery or claim for the refund of overassessed taxes dates from the time the last installment of such tax was paid unless the recovery or refund is expressly limited by statute to the portion of the tax paid within the limitation period.—The reasoning in the *Hills* case at pp. 305 and 306 is equally in point here.

The government's contention that subsection (g) is limited by subsection (b) (2) to a refund only of the portion of the over-assessed taxes paid within the limitation period disregards the plain direction of subsection (b) that its provisions are applicable except as provided in subsection (g), *inter alia*. Subsection (g) applies peculiarly to claims for credit or refund growing out of assessments of war income or excess profits taxes under the Revenue Acts from 1917 to 1921, inclusive, with respect to which a waiver of the time for assessment has been filed. The scope and intentment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b). No plausible reason is advanced why a claim
83 for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two coordinate clauses be treated as superior to the other. The suggestion derives entirely from the appellant's use in argument of a wholly unrelated provision of the statute.

We conclude that the plaintiff's claim for refund was timely, having been filed within four years of the final payment on account of the tax liability for the year in question. Consequently, the Commissioner was in error in refusing to certify for refund the total determined overassessment. His action, based as it was on an invalid reason, did not amount to a disallowance of the claim. The two year limitation which runs from the time of the disallowance of the claim is therefore not pertinent. The plaintiff's right of action arose from the certificate of overassessment and the suit, which was instituted within six years from the date of payment of the tax, was timely. *Bonwit Teller & Co. v. United States*, 283 U. S. 258, 263-265. The suit was for the recovery of a tax erroneously assessed and collected, as the Commissioner had formally determined. The Collectors to whom the tax had been paid were no longer in office. The District Court therefore had jurisdiction. *United States v. Bertelsen & Petersen Engineering Co.*, 306 U. S. 276, 281.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

*Clerk of the United States Circuit Court
of Appeals for the Third Circuit.*

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In United States Circuit Court of Appeals for the
Third Circuit

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No. 7375. October Term, 1940

THE A. S. KREIDER COMPANY, PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-PLAINTIFF

Judgment

Filed December 17, 1940

On appeal from the District Court of the United States, for the
Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from
the District Court of the United States, for the Middle District
of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged
by this Court that the judgment of the said District Court in this
cause be, and the same is hereby affirmed.

Philadelphia, December 17, 1940.

JONES,
Circuit Judge.

[File endorsement omitted.]

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[Clerk's certificate to foregoing transcript omitted in
printing.]

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Supreme Court of the United States

Order allowing certiorari

Filed April 14, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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